87-1367

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN EMIL BOMHARDT,
Appellant

v.

STATE OF MARYLAND,
Appellee

On Appeal From the Court of Special Appeals of the State of Maryland

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1

Whether Article 81, Revenue and Taxes, of the Annotated Code of Maryland, as applied in this criminal case, is invalid because the terms, definitions and requirements of Article 81, and the forms provided thereunder, are vague, ambiguous and discriminatory, lacking explicit identification of appellant's class of transactions, and thus is unconstitutional and contrary to the due process and equal protection clauses of the 14th amendment to the U. S. Constitution?

2

Whether fundamental rights found in the 9th and 14th amendments to the U. S. Constitution were violated when a married technician was imprisoned for failure to file income tax forms, and continue to be violated, where the forms provided by the State Comptroller are vague, ambiguous and discriminatory, lacking specific provisions for master-servant transactions, and the commanded filing would impair the sustenance of the technician and his spouse by invading the technician's property rights in his labor?

3

Whether the terms, definitions and procedures adopted by the Court of Special Appeals of Maryland for this case should operate prospectively rather than retroactively?

NOTICE UNDER RULE 28.4 (b)

Resolution of the Constitutional issues in this case may affect Title 26 of the United States Code and, thus, 28 U.S.C. Section 2403 (a) may be applicable.

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JURISDICTIONAL STATEMENT

John Emil Bomhardt, the appellant, appeals from the mandate of the Court of Special Appeals of the State of Maryland, dated October 8, 1986 and the mandate of that Court dated July 13, 1987 resulting from further criminal proceedings affirming the judgments of the Circuit Court for Anne Arundel County, Maryland. The opinions and judgments find the Revenue and Taxation Acts of Maryland, Article 81, to be constitutionally valid and the resulting state action not violative of appellant's rights under the United States Constitution.

This Court has jurisdiction of this appeal. The federal questions were raised and decided below and are substantial issues important to the rights of the large class of citizens who receive wages for labor in the master-servant relationship.

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland dated September 8, 1986 resulting in a limited remand is unreported. It is reprinted in the appendix at page 36a.

The memorandum decision of the Circuit Court for Anne Arundel County, Maryland (Lerner, J.) is reprinted in the appendix at page 27a. This opinion and judgment entered on October 29, 1986 was the result of a remand hearing on a jurisdictional issue.

The opinion of the Court of Special Appeals of Maryland dated June 11, 1987 is reported at 71 Md. App. 609. It is reprinted in the appendix at page 13a. That appeal is from the remand jurisdictional hearing judgment and the ruling affirms the prior judgments.

JURISDICTION

This appeal is being docketed in this Court within 90 days from the denial on November 20, 1987 of a timely Petition for Writ of Certiorari to the Court of Appeals of Maryland, the State's highest court (No. 316, September Term, 1987).

This appeal is from the opinions and judgments of the Court of Special Appeals of Maryland which are now the judgment of the highest state court reviewing federal questions arising from appellant's criminal conviction. (No. 1453, September Term, 1985 mandate for limited remand issued October 8, 1986; No. 1509, September Term, 1986 mandate affirming prior judgments issued July 13, 1987).

A Notice of Appeal to this Court was timely filed on February 4th, 1988 in the Court of Special Appeals of Maryland.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (2). A prior appeal to this Court in this case, submitted prematurely, was dismissed for want of jurisdiction on April 27, 1987. (Appeal No. 86-1586, October Term, 1986).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, 9th, 14th and 16th amendments.
pertinent text in the appendix at page 1a.
United States Statutes, U.S.C. Title 26, Internal Revenue Code, Sections 6012 (a) and 61 (a).
Pertinent text in the appendix at page 1a.
Maryland Statutes, Article 81, Revenue and Taxes, sections 288, 294, 304, 310, and320.
pertinent text in the appendix at page 3a.

STATEMENT OF THE CASE

Facts from the trial record:

This case was initiated when the State arrested the appellant charging him with failure to file income tax forms under Article 81, Section 320, of the Maryland Annotated Code.

The appellant had been employed by the Westinghouse Corporation for over 29 years and at the time of his arrest he was a laboratory technician. The appellant and his wife had filed a Maryland income tax form for the year 1978 on April 12, 1979 and had received a refund of $62.99.

During 1981, Westinghouse paid him wages for his labor in the amount of $25,178.19. During 1982, he received wages in the amount of $28,093.91 and for the year 1983 he received wages in the amount of $29,543.91. This information is recorded on federal W-2 forms by a Westinghouse computer which has been programmed with hours worked, etc. The appellant maintained a rental property during this period from which he received rent in the amount of $2,435.27 for the year 1981, $2,775 for the year 1982 and $3,245 for the year 1983.

On January 4, 1982, the appellant filed a Maryland form MW 504, Maryland Employee Withholding Exemption Certificate as required by Westinghouse, answering questions provided thereon and thereby declared exemptions to the withholding of funds

from his wages by Westinghouse. A memorandom was attached to the certificate which explained his wages were an equal exchange for the labor he provided, along with an affidavit equating an equal exchange of the defendent's property (labor) for an equal exchange of the company's property (money). On June 21, 1984, the appellant was informed by the Office of the Comptroller that these MW 504 forms were now invalid and Westinghouse had been advised to begin withholding from his wages using one exemption. The appellant objected and threatened to institute legal action against Westinghouse to protect his rights.

On November 29, 1984, the Office of the Comptroller notified the appellant that they were unable to locate his returns for 1979 to 1983 and that it appeared that returns should have been filed. Forms were enclosed with a request to complete them and to submit them with (undetermined) taxes due.

The filing of a state income tax return is required if the total of all incomes (gross income) is $3000 for single status and $5400 for married filing jointly.

The appellant was arrested on May 6, 1985 on warrants charging he did fail to file tax returns for the years 1981, 1982, and 1983. The case was prosecuted on the 9th and 10th of October, 1985 before a jury in the Circuit Court for Anne Arundel County, Maryland by Assistant Attorney Generals of the State of Maryland on appointment by the governor to investigate and prosecute state income tax violations. The appellant was defended *pro. se.* The jury found him guilty on all counts. On November 22, 1985 Judge Eugene M. Lerner sentenced him to the maximum imprisonment of six months on each of three counts to be served consecutively and to a maximum fine totalling $1500.

The appellant was incarcerated immediately on November 22, 1985. He was released on bail pending appeal after a Habeas Corpus hearing on December 13, 1985. He was again incarcerated on January, 16 1987 after the remand hearing judgment and while an appeal was pending. He has been on parole since June 22, 1987.

How the federal questions were raised:

The instant case automatically has federal questions by its nature because the state statute incorporates portions of Title 26 of the United States Code. Additional federal questions raising constitutional issues were raised at the trial court level before, during, and after trial by the appellant in *pro se* proceedings, and by counsel in the appellate courts.

Before trial: The appellant filed a motion to show constraining need, or in the alternative to dismiss in the District Court for Anne Arundel County, Maryland. The motion asked the Court to have the State show the . . . lack of ambiguous, capricious, or arbitrary demands . . .necessary compliance of such a statute to have the force and effect of Law. . . that said statute applies to a natural sovereign individual and is not an abrogation of his inalienable rights guaranteed by the Constitution for the United States. . . and the Declaration of Independence. When the case was moved to the Circuit Court for Anne Arundel County, Maryland for a jury trial the motion was renewed.

At arraignment on July 22, 1985 the presiding judge directed the prosecution to set a hearing for all motions, but all pre-trial motions were summarily dismissed without a pre-trial hearing. The aforesaid motion was not answered by the State.

During Trial: The witnesses for the State testified on the definitions of terms and application of Title 26, U.S.C., Internal Revenue, sections 6012 (a) and 61 (a) to the instant case. The only witness called by the defense was the recall of a state witness to establish the fact that the state's officers were not using information from a federal income tax return when they testified.

After trial: Appellant filed a memorandum supporting a motion for a new trial challenging the validity of the state statute and state action as contrary to the due process and equal protection clauses of the U.S. Constitution as amended by the 14th Amendment and, inter alia,, that the forms provided do not have entry points to make the transition from the receipts to income in

the transaction of wages for labor. The State offered no rebuttal and the trial judge denied the motion.

On Appeal: The foregoing federal questions were argued in the Court of Special Appeals of Maryland relying on the U.S. Constitution as amended by the 9th and 14th Amendments. No other hearings have been held on the federal questions.

REASONS WHY THE QUESTIONS ARE SUBSTANTIAL AND PLENARY CONSIDERATION IS REQUIRED

This case involves a state income tax statute which has been accepted by the public for many years, but economic changes have undermined this public trust. The statute has become a burden on property rights in labor through the overbroard application of vague and ambiguous language to reach unlawfully beyond income to underlying wealth. Upon criminal prosecution under this statute, the appellant interposed a constitutional claim to lack of due process under the U.S. Constitution because of a lack of sufficient specificity to support criminal sanctions. On vague statutes: *Connally v. General Construction Co.*, 269 US 385 (1926).

The State's only answer to appellant's constitutional issues was a defense at the appellate level that the application and substance of the Maryland law is constitutional because the General Assembly (exercising limitless power) could have imposed a tax on the taxpayer's gross income without consideration of exemptions and deductions if it had seen fit to do so. This response does not take into consideration that the issue is not the assessment of a tax, but the use of criminal sanctions to force the performance of an act without specific authority to compel the appellant to do such act. It also does not take into consideration the self-imposed limitation on powers that the state chose in the state statute where it refers to portions of the income tax provisions of the federal internal revenue code for definitions of important words and phrases. There is no compelling state interest for such reliance.

The decisions of the lower courts in this case, without review by this Court, will result in continued application of this statute as a direct tax on persons and their labor although it is designated an income tax. Use of the same language in the same manner in federal cases would have the U.S. Congress laying an unconstitutional unapportioned direct capitation tax because the requirement of the 16th amendment to the U.S. Constitution to sever income from sources would not be met.

This controversy has not been resolved. There are conflicts among the lower courts, misapplication of precedent, continued infringement of fundamental rights, and other errors by the courts below.

Conflict among lower courts:

Since the term "Wages for Labor" cannot be found in the state statute or federal statute, the courts in the instant case have made an attempt to accommodate the government's position by finding a broad statutory net to capture all income of everyone everywhere. In doing so, they are not always careful to distinguish "income," "receipts," and sources generating income." Such a broad net must be structured to release the underlying wealth while capturing the intended classes of incomes. The structure of the forms supplied pursuant to the statute—a delegated legislative power—do not allow the potential taxpayer the right and facility to enter sufficient information to identify, segregate and tally accessions to underlying wealth.

The opinions of the Court of Special Appeals of Maryland in this case and opinions in the federal courts construing the same statutory provisions are inconsistent in two particulars:

1. The opinion by the court below and opinions of the federal courts differ in their approach to the resolution of the wages for labor issue. The Court of Special Appeals of Maryland held that none of the items of sources of income listed in I.R.C. Section 61 (a) include wages in exchange for labor. They put wages for labor

in the general class "other" relying on the phrase "income from whatever source derived." Some of the U.S. Circuit Courts of Appeal have held that wages are income and put wages for labor in the class "Compensation for Services (including fees, commissions and similar items)". e.g. *Granzow v. C.I.R.* 739 F.2d (7th Cir., 1984).

The differences in the above opinions create an insurmountable obstacle to the potential taxpayer's computation of taxes without his prejudicing his fundamental rights. The information given on returns in response to the federal and state statutes must correlate to satisfy other provisions of law. Furthermore, these decisions neglect the necessary constitutional requirement to sever income from underlying wealth. *See, 16th amend., U.S. Constitution; Md. Annotated Code,* Article 81, Section 297, "Copy of federal return may be required."

2. The opinion of the court below and opinions in the federal courts differ in the approach to the problem of alteration of income tax return forms by the potential taxpayer. The Court of Special Appeals of Maryland in the instant case held that the forms may be added in to any manner. The U.S. Circuit Courts of Appeals have held that an altered 1040 form does not constitute a return, e.g. *Beard v. C.I.R.* 793 F.2d 139 (6th Cir., 1986)

These opinions, state and federal, are discriminatory and contrary to the U.S. Constitution by prescribing and mandating forms which limit the entry points for information to be supplied by commanded filers, particularly those reached through overbroad application of vague language. Thus, for those in the master-servant relationship, the rights to deductions from receipts of wages for labor, such as the consideration given including expenses to maintain and deliver labor, are either arbitrarily precluded or interpreted as matters for legislative grace rather than fundamental right irrespective of legislative intent.

Misapplication of precedents:

The litigants and the courts are not always careful in the use of the words and phrases of the statutes and case precedent. Such terms as receipts, sources of income, return of capital, return of expenses, income, total income, gross income, adjusted gross income, and sources of payment can be more important in a wages for labor issue than in other litigation where that language is used but it is not in dispute by the litigants. This is particularly true in early income tax cases where the high personal exemptions precluded the presence of a litigant receiving wages for labor.

The only reference to case precedent by the State in answer to the appellant's constitutional defense is a group of Maryland cases in the appellee's brief to the Court of Special Appeals of Maryland. The cases cited are incorrectly applied because they are not adaptable to a wages for labor dispute. *Evans v. Comptroller of the Treasury, Income Tax Division,* 273 Md 172, 328 A.2d 272 (1974); *Marcos Associates, Inc. v. Comptroller of the Treasury,* 265 Md 669, 291 A.2d 489 (1972); *Comptroller v.Diebold,* 279 Md 401, 369 A.2d 77 (1977); *Katzenberg v. Comptroller of the Treasury,* 263 Md 189, 282 A.2d 465 (1971); *Leatherwood v. State* 49 Md. App. 683, 435 A.2d 477 (1981).

Leatherwood, *supra,* is the only criminal Article 81 case cited. The issues were application of the provisions pertaining to self-incrimination in the 5th Amendment to the U. S. Constitution and the question of the legality of the delegation of legislative authority to rely on the federal definition of income. Katzenberg, *supra,* was referred to in turn for the holding that the adoption of the federal definition does not constitute delegation of legislative authority.

Neither of these issues are in the instant case; delegation or not there are only federal statutory definitions as supported by case precedent available. "The Comptroller. . . He shall prescribe forms similar to those utilized by the federal government except to the extent required by the differences between this subtitle and

its application and the federal act and its application. He shall apply as far as practicable the administrative and judicial interpretations of the federal income tax law." *Md. Annotated Code,* Article 81, Section 304 (a).

Although the State has not offered precedents of this Court in the proceedings below, it is imperative to ultimately consider them in the resolution of the federal questions raised. The following cases (excepting Brushaber), which were cited on appeal by the appellant to fill this void, can be considered the leading cases defining some important words and phrases of the federal income tax: *Pollack v. Farmer Loan and Trust Co.,* 157 US 429 (1895), 158 US 601 (1895); *Knowlton v. Moore,* 178 US 41 (1900); *Brushaber v. Union Pacific Railroad Co.,* 240 US 1 (1916); *Southern Pacific Co. v. Lowe,* 247 US 334 (1917); *Einer v. Macomber,* 252 US 189 (1929); *Lucas v. Earl,* 281 US 111 (1930); *Commissioner v. Glenshaw Glass Co.,* 348.US 426 (1955); *James v. US,* 366 US 213 (1961). Although these cases also are not on point for the wages for labor issues they may be useful to develop a background theory from which the elaboration of definitions may be investigated; however, the cases do not reach beyond the managerial structure of business entities, into which profits have historically been passed, to the purchase of labor as a commodity resource.

Many law and ecomonic treatises have been unsuccessfully reviewed to find cited cases of this Court where the litigant contested the definition of profits as applied to basic wages (hourly or weekly) that the worker received for labor in the master-servant relationship. Such cases could, if they existed, answer the federal questions raised here.

An example of the problem in a treatise is the mistaken reference to the Pollock case, citation *supra,* as: "On the other hand, taxes on wages, professions, and trades were not considered direct taxes, and the tax on those sources of income would have been valid had not the entire tax amendment been ruled illegal in the second hearing because of the other unconstitutional provisions." *The Politics and Development of the Federal*

Income Tax, John F. Witte, The University of Wisconsin Press (1985) at Page 74 (The book is in this Court's library at KF6369.W69 1985.)

The litigant in Pollock was a stock holder raising issues pertaining to capital. The outcome could not be limited to these issues and to the litigant's narrow interests because as the court said, "If that be stricken out, and also the income from all invested personal property, bonds, stocks, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be borne by professions, trades, employment, or vocations; and in that way what was intended as a tax on capital would remain in substance a tax *on* occupations and labor... We do not mean to say . . . might not . . . lay *excise taxes* on business, *privileges,* employments, and vocations. But *this is not such an act;* and the scheme must be considered as a whole." (emphasis added), Pollock, 148 US 601.637.

The author of the treatise does not recognize that the litigant on the non-capital issues was not a proper party to dispute the other provisions making a problem for the court. However, it must be recognized that the court ruled—even if it is consider *dicta*—that the tax was *on* occupations and labor and thus a *direct tax.* The author also injects "wages" into the controversy where it is not found, and he fails to consider the distinction of a direct tax *imposed on income* an indirect tax imposed on *licenses and privileges* measured by income. Such errors are typical in income tax dissertations.

The omission of federal precedent, which the Comptroller of the State of Maryland must consider in the instant case, is equivalent to implicit misapplication by default just as the improper citing of the Maryland cases and *dicta* therein is explicit misapplication.

Infringement of fundamental rights:

For the appellant to comply with the command (or request) of the State to file prescribed income tax forms, there would be an inherent chill or restraint imposed on fundamental rights. These rights are expressed in the refrain "life, liberty and property" which is often debated and articulated as three independent concepts, but each of the trio can be shown to interact as facets of a larger unity—man and his labor are inseparable:

> "We hold from God the gift which includes all others. This gift is life—physical, intellectual and moral life.
>
> But life cannot maintain itself alone. The Creator of life has entrusted us with the responsibility of preserving, developing, and perfecting it. In order that we may accomplish this, He has put us in the midst of a variety of natural resources. By the application of our faculties to these natural resources we convert them into products, and use them. This process is necessary in order that life may run its appointed course.
>
> Life, faculties, production—in other words, individuality, liberty, property—this is man. And in spite of the cunning of artful political leaders, these three gifts from God precede all human legislation, and are superior to it.
>
> Life, liberty, and property do not exist because men have made laws. On the contrary, it was the fact that life, liberty, and property existed beforehand that caused men to make laws in the first place.
>
> Each of us has a natural right—from God—to defend his person, his liberty, and his property. These are the three basic requirements of life, and the preservation of any one of them is completely dependent upon the preservation of the other two. For what are our faculties but the extension of our individuality? And what is property but an extension of our faculties?" *The Law, Frederick Bastiat, 1850*(quoted from

> the Foundation for Economic Education edition of 1950 at page 5.)

While some political scientists, philosophers and practitioners of jurisprudence may object to the reference to a deity or natural law or natural rights, the substance of the above lengthy quote is generally accepted. An example of similar language from the courts is:

> "'Life' protected by the federal constitution includes all personal rights and their enjoyment embracing the use and enjoyment of the faculties, acquiring useful knowledge, right to marry, establish a home, and bring up children, freedom of worship, conscience, contract, occupation, speech, assembly, and press." *Rosenblum v. Rosenblum* 42 NYS2d 626, 630, (quoted from Black's Law Dictionary Rev. 4th Ed. at page 1074).

Article 81 infringes upon the quiet enjoyment of basic civil rights to provide the necessities and expenses for fulfilling the obligations incurred when a Maryland resident exercises the fundamental rights of marriage and procreation under the 9th amendment to the U.S. Constitution. On marriage: *Loving v. Virginia,* 388 US 1 (1967), On procreation: *Skinner v. Oklahoma,* 316 US 535 (1942).

Thus, the deprivation of the rights reaches beyond the incarceration and monetary penalties imposed on the appellant in the criminal prosecution to the derogation of the rights of the class of those receiving wages for labor in the master-servant relationship. It is a well known fact that even persons below the poverty line are treated as profit making entities by the taxing agencies in the application of the income tax codes as is evidenced by the following:

> "We believe that our federal and state tax systems should be evaluated continually in terms of their impact on the poor. We also believe that the families below the official poverty line should not be required to pay income taxes. Such families, by definition, are without sufficient resources to

purchase the basic necessities of life." *A MARYLAND RESPONSE to the Pastoral Letter on Catholic Social Teaching and the U.S. Economy* by the Maryland Catholic Conference, Baltimore, Maryland, January 1988 at Page 12.

The report goes on to state that recent changes in the state tax laws have not removed all Marylanders below the poverty line from the tax rolls. Such people are usually in the master-servant class.

This Court must consider the constitutional dimensions of the fact that statutory personal exemptions had the effect of excluding the class of workers in the master-servant relationship as a matter of law, but that the value of these exemptions has been eroded by inflation so that the original intent of the legislature, whatever it might have been, may no longer exist.

The statute has become a direct tax on the person or the person's labor. It seems to be a capitation tax as used in Article I, Section 9 of the U.S. Constitution. A contrary opinion concerning categories of tax law proclaims that capitation taxes may have classifications but that they cannot have provisions correcting for levels of "income". *FEDERAL INCOME TAXATION OF INDIVIDUALS And Basic Concepts in the Taxation of All Entities,* at page 12, Daniel Q. Posin, West Publishing Co. 1983.

The category of a tax is determined not only by the words imposing the tax in the statute but also by what is done in enforcement. Our forefathers gave great powers of taxation to the governments, but they were not arbitrary powers; there are different rules for different categories. Taxes are imposed either on property, use, person, privilege, event or transaction.

Katzenberg, *supra,* holds that an income tax is not a property tax. The Court of Appeals of Maryland has also held that the Maryland income tax is on the resident and privilege of residency with income the measure of the tax. See *Fax, et ux v. State Tax Commission of Maryland* 212 Md 296 (1957). That Court has also held that taxes imposed on subjects other than income, e.g.

franchises, privileges, etc., are not income taxes, although measured on the basis of income. See *Gardella et ux v. Comptroller of the State of Maryland et al* 213 Md 1 (1957). Article 81 states, "There is hereby levied and imposed for each calendar year . . . a tax on the net taxable income. . . of every resident individual of this State. . . "Md. *Annotated Code,* Article 81, Section 288.

From the foregoing, it is clear that the appellant's fundamental rights in his labor have been violated by the ambiguities in the object, wording and application of Article 81.

Retrospective and other matters:

Retrospective:

The rule adopted by the Maryland courts in this case to allow additions in any manner to the forms provided by the Comptroller should be applied prospectively because it was not the law at the time the crimes were committed. The applicable law is from section 294 (a) "... shall file with the Comptroller a return in such form as the Comptroller shall prescribe. . . " and from section 310(b) "Any claim for a refund made under and pursuant hereto shall be in such form, verified in such manner, contain such information, and be supported by such documents as may be prescribed by regulations of the Comptroller. . . "

Other matters:

The prosecutors in this case came prepared to convict a "protester" but found a methodical, persistent worker defending his property rights in labor from confiscation. The presiding judge gave the jury the prosecutor's requested instruction, "It is not a defense that the wilfull failure to furnish tax information required by law was done for the purpose of protesting government policies, even if such protest is with good motive." However, no testimony or evidence was offered or admitted into the trial involving the issue of protest.

The insinuation continues to plague the appellant and could be factor in falsely influencing the revire by any Court. It may have affected the Maryland courts in their contemplation of the facts.

The Court of Special Appeals of Maryland in its opinion at page 36a, in the appendix, misinterpreted the appellant's entries on the Employee's Maryland Exemption Certificate in regard to withholding of funds from wages as a broader claim to exemption from the tax law. They then concluded that the appellant should have applied for a statutory exemption. The problem presented is not one of a special exemption under the statute for the appellant, but lack of specific legislative intent to reach those in the master-servant relationship. The inability, using the forms provided, to identify, segregate and tally any accession to wealth from wages for labor, where in fact there are no accretions, arises from this lack of legislative intent.

CONCLUSIONS

For the foregoing reasons, the appellant urges this Court to note probable jurisdiction and to schedule this case for plenary consideration.

Respectfully Submitted,

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87-1967

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JURISDICTIONAL STATEMENT

APPENDIX

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APPENDIX TO

JURISDICTIONAL STATEMENT

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Opinion, Court of Special Appeals, No. 1453	36a
Commitment Record, No. 9216	64a

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution

Ninth Amendment:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sixteenth Amendment:

> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without regard to any census or enumeration."

United States Statutes

U.S.C. Title 26, Internal Revenue Code:

Section 61. Gross income defined.

"(a) General definition - Except

as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a dece-

dent; and

(15) Income from an interest in an estate or trust."

Section 6012. Persons required to make returns of income.

"(a) General Rule - Returns with respect to income taxes under subtitle A shall be made by the following:

(1)(A) Every individual having for the taxable year a gross income of $1,000 (the exemption amount) or more, except that a return shall not be required of an individual (other than an individual described in subparagraph (C)) -

....

(iii) who is entitled to make a joint return under section 6013 and whose gross income, when combined with the gross income of his spouse, is, for the taxable year, less than $5,400 (the sum of twice the exemption amount plus the zero bracket amount applicable to a joint return), but only if such individual and his spouse, at the close of the taxable year, had the same household as their home."

Maryland Statutes

Article 81, Revenue and Taxes:

Section 288, Imposition of tax.

"(a) Tax on individuals - There is hereby levied and imposed for each calendar year beginning after December 31, 1966, a tax on the taxable net income, as defined in Section 280 (a) of every resident individual of this State and on the taxable net income, taxable in this State, of every individual not a resident of this State."

Section 294, Who shall file returns.

"(a) Individuals generally. - (1) Every individual resident of this State, and every individual not a resident of this State, receiving income derived from sources within this State, other than fiduciaries, who is required to file a federal income tax return under the provisions of Section 6012 (a) of the Internal Revenue Code, as amended from time to time, or whose federal income together with any modification additions contained in Section 280 (b) of this subtitle exceed the limits provided by said Section 6012 (a), shall file with the Comptroller a return in such form as the Comptroller shall prescribe, ..."

Section 297, Copy of federal return may be required.

"Whenever in the opinion of the Comptroller it is necessary to

examine the federal income tax return or a copy thereof, of any taxpayer in order properly to audit the returns of such taxpayer, the Comptroller shall have the right to compel the taxpayer to produce for inspection a copy of such return and all statements and schedules in support thereof."

Section 304, Administration.

"(b) Records, statements and returns. - Every taxpayer liable to any tax imposed by this subtitle shall keep such records, render such statements, file such returns, and comply with such rules and regulations as the Comptroller from time to time may prescribe. Whenever the Comptroller judges it necessary he may require any taxpayer by notice served upon him to file a return, render such statements, or keep such records as he deems sufficient, to show whether or not such taxpayer is liable to tax under this subtitle and the extent of such liability."

Section 310, Refunds.

"(a) In general. - In the event any person pays more tax than is found to have been due, the Comptroller shall refund the overpayment in the manner herein provided except that any refund in an amount less than one ($1.00) dollar shall not be made.

(b) Form of claim; time of filing. - Any claim for a refund made under and pursuant hereto shall be in such form, verified in such manner, contain such information, and be supported by such documents as may be prescribed by regulations of the Comptroller and shall be filed within three years from the date the return was due to be filed."

Section 320, Failure to file a return or report required by this subtitle.

"The failure on the part of any person or taxpayer to file a return or report as required by the provisions of this subtitle, or to comply with any action taken by the Comptroller pursuant to Section 304 hereof shall be deemed a violation of the provisions of this subtitle subject to penalty and interest as prescribed in Section 318 hereof. The wilful failure on the part of any person or taxpayer to file a return or a report as required by the provisions of this subtitle or to comply with any action taken by the Comptroller pursuant to Section 304 hereof shall be a misdemeanor, subject to a fine of not exceeding five hundred dollars ($500) or imprisonment for not exceeding six months, or both, in the discretion of the Court."

No. ____

JOHN E. BOMHARDT

Appellant

v.

STATE OF MARYLAND

Appellee

In the Court of Special Appeals

of Maryland

October Term, 1987

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that John Emil Bomhardt, the appellant above-named, hereby appeals to the Supreme Court of the United States from the opinions and judgments of this Court in the above captioned case, No. 1453, September Term, 1985 and No. 1509, September Term, 1986, which together are now the final judgment

affirming the conviction entered in the Circuit Court for Anne Arundel County, Maryland.

A petition to the Court of Appeals of Maryland for writ of certiorari to review the opinion issued in No. 1509 on June 11, 1987 and the mandate issued on July 13, 1987 was denied on November 20, 1987. That denial includes refusal of the appellant's prayer to review the judgment of No. 1453 which disposed of the federal questions.

An earlier petition to the Court of Appeals of Maryland for writ of certiorari to review the opinion issued in No. 1453 on September 8, 1986 and the mandate issued on October 8, 1986 was denied on January 2, 1987.

This appeal is taken pursuant to Section 1257(2) of Title 28 of the United States Code.

ANDREW J. GROSZER, JR., Esq.
12209 Happy Hollow Road
Cockeysville, Maryland 21030
(301) 561-8047
Counsel for Appellant

Filed February 4, 1988

No. ____

JOHN EMIL BOMHARDT

Appellant

v.

STATE OF MARYLAND

Appellee

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

October Term 1987

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the

foregoing Notice of Appeal to the United States Supreme Court was mailed to J. Joseph Curran, Attorney General, Seven North Calvert Street, Baltimore, Maryland 21202 and to Daniel Anderson, Assistant Attorney General, at the same address on the 4th day of February, 1988.

Andrew J. Groszer, Jr., Esq.
Attorney for Appellant

Filed February 4, 1988.

JOHN EMIL BOMHARDT

v.

STATE OF MARYLAND

In the Court of Appeals of Maryland

Petition Docket No. 316

September Term, 1987

(No. 1509, September Term, 1986

Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorai is desirable and in the public interest.

Robert C. Murphy

Chief Judge

Date: November 20, 1987

MANDATE

COURT OF SPECIAL APPEALS

No. 1509, September Term, 1986

John Emil Bomhardt

v.

State of Maryland

JUDGEMENT: June 11, 1987: Opinion by Gilbert, C.J. Judgement affirmed. Costs to be paid by appellant.

July 13, 1987: Mandate issued.

STATEMENT OF COSTS:

In Circuit Court: for Anne Arundel County 9216

Record 40.00

Stenographer Costs.....49.50

In Court of Special Appeals:

Filing Record on Appeal.....50.00

Printing Brief for Appellant....96.00

Printing Brief for Appellee.....52.80

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special

Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this Thirteenth day of July A.D. 1987.

Howard E. Friedman

Clerk of the Court of Special Appeals.

Costs shown on this mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

NO. 1509

September Term, 1986

JOHN EMIL BOMHARDT

v.

STATE OF MARYLAND

Gilbert, C.J.

Bloom
Karwacki,

JJ.

OPINION BY GILBERT, C.J.

Filed: June 11, 1987

"If, as some assert, the law is the light of the land, taxes are the batteries that power the light."[1]

Probably since taxes were first levied, few have enjoyed paying them. Fewer yet have defied the right of the sovereign to assess taxes. Still fewer have been successful in their defiance of the tax laws. This case represents one of the latter majority.

As part of his continuing battle against paying Maryland income taxes, John Emil Bomhardt avers that the Attorney General was not empowered to sign a Criminal Information. Proceeding

from that premise, Bomhardt reasons that since the Attorney General did not sign the Criminal Information upon which Bomhardt was tried the convictions are invalid. Hence, he urges us to reverse the judgments of the Circuit Court for Anne Arundel County and concomitantly direct his release from confinement. We shall do neither but rather affirm the judgements. We explain.

Mr. Bomhardt's first appeal to this court was the result of his being convicted of willfully failing to file State income tax returns for the years 1981, 1982, and 1983. In his initial appeal he posited six questions, including a challenge to the authority of the Attorney General to act as prosecutor. We perceive no error in the trial proceedings with respect to five of the issues raised by Bomhardt; but, in an

unreported opinion, Bomhardt v. State, No. 1453, September Term, 1985 (filed September 8, 1986) (unreported), we ordered "a limited remand under rule 1071 to the trial court for the sole purpose of ascertaining whether the Attorney General possessed authority to maintain this prosecution." The convictions remained in effect pending those further proceedings.

Pursuant to that limited remand, a hearing was held before Judge Eugene M. Lerner. At that hearing a March 9, 1984 letter from then-Governor Harry Hughes to the then-Attorney General Stephen H. Sachs was admitted into evidence. The letter read, in pertinent part:

> "... I hereby authorize and direct the Attorney General to act with the same powers as the State's Attorney for Anne Arundel County in the investigation and prosecution of cases involving criminal violations of the Maryland income tax laws

> which are brought to your attention by the Comptroller's office for proscution in Anne Arundel County.
>
> .... You are authorized to use any necessary subpeona powers to present to the Grand Jury for Anne Arundel County any evidnce or testimony you consider appropriate to carry out this authorization. You are further authorized, in this category of criminal actions, to act with the same authority as the State's Attorney for Anne Arundel County to bring and prosecute resulting criminal charges."

Judge Lerner ruled that the "gubernatorial authorization (in the March 9 letter) cloaked the Attorney General with the requisite authority under Article V, Sect. 3 of the Constitution of Maryland to investigate and prosecute (Mr. Bomhardt)." Consquently, he ordered the convictions to stand.

Article V, Sect. 3 of Maryland's Constitution provides, in pertinent part:

"(a) The Attorney General shall:

....

> (2) Investigate, commence, and prosecute or defend any civil or criminal suit or action or category of such suits or actions in any of the Federal Courts or in any Court of this State, or before administrative agencies and quasi legislative bodies, on the part of the State or in which the State may be interested, which the General Assembly by law or joint resolution, or the Governor, shall have directed or shall directed to be investigated, commenced and prosecuted or defended.
>
> (3) When required by the General Assembly by law or joint resolution, or by the Governor, aid any State's Attorney or other authorized prosecuting officer in investigating, commencing, and prosecuting any criminal suit or action or category of such suits or actions brought by the State in any Court of this State."

The Court of Appeals has explained that Article V, Sect.3(a)(2) "vests the Attorney General with ... prosecutorial powers." In re Special Investigation No. 281, 299 Md. 181, 199, 473 A.2d 1, 10 (1984).

The Governor's letter authorized and

directed the Attorney General to "act with the same powers as the State's Attorney ... in the investigation and prosecution of (the instant case and authorized the Attorney General) to act with the same authority as the State's Attorney ... to bring and prosecute resulting criminal charges."[2] Persuant to Article V, Sect. 3, similar authority and power have been conferred by the Governor on the Attorney General, see, e.g., In Re: Special Investigation No. 195, 295 Md. 276, 277, 454 A.2d 843 (1983); Wiener v. State, 290 Md. 425, 428, 430 A.2d 588, 591 (1981), and upheld on appeal, In re Special Investigation No. 281, 299 Md. 181, 199-200, 473 A.2d 1, 10 (1984), In Re: A Special Investigation No. 277, 55 Md. App. 650, 655, 466 A.2d 48, 51 cert. denied, 297 Md. 417 (1983).

As Chief Judge Murphy opined for this court[3] in State v. Hunter, 10 Md. App. 300, 305, 270 A. 2d 343, 345 (1970), modified on other grounds, 263 Md. 17, 278 A.2d 608 (1971), "Under the Constitution and laws of Maryland, the State's Attorney is a constitutional officer elected by the people and entrusted by them with the prosecution of persons accused of crime." It is the duty of the State's Attorney to "prosecute ..., on the part of the State, all cases in which the State may be interested...." Md. Ann. Code Art. 10, Sect. 34. In performing that duty, it is within the State's Attorney's discretion "to determine the mode or means ... to initiate the criminal charges." Wodoslawsky v. State, 36 Md. App. 654, 659, 374 A.2d 917, 920 cert. denied, 281 Md. 746 (1977), 434 U.S. 1068, 98 S. Ct. 1248, 55 L. Ed. 2d

770 (1978).

The offense of willfully failing to file a state income tax return is a misdemeanor, Md. Ann. Code Art. 81, Sect. 320, and is within the district court's exclusive original jurisdiction, Md. Cts. & Jud. Proc. Code Ann. Sect. 4-301(b)(1). The prosecution for that offense may be commenced by either a criminal information or a statement of charges. Md. Rule 4-201(b)(1) and (2). Md. Rule 4-202(b) requires that a criminal information must be "signed by the State's Attorney of a county or by any other person authorized by law to do so."

The State's Attorney for Anne Arundel County was fully empowered to sign and file in the district court a criminal information against Mr. Bomhardt alleging willful failure to file 1981, 1982, and 1983 State income tax returns. In the

matter sub judice, on or about April 10, 1985, the Attorney General filed in the district court[4] a criminal information which had been signed by the Attorney General[5]. Under Article V, Sect. 3, together with the direction contained in the Governor's letter, the Attorney General was fully vested with the power to "commence" and prosecute these criminal charges.

Governor Hughes's letter to the Attorney General extended authority to investigate and prosecute "cases involving criminal violations of the Maryland income tax laws which are brought to (the Attorney General's) attention by the Comptroller's office for prosecution in Anne Arundel County." Mr. Bomhardt argues that this extension exceeds the "category of ... suits or actions" contemplated by Article V, Sect.

3, thus making the grant of authority "overbroad in nature and ... unconstitutional." We do not see it that way.

Past Gubernatorial grants of authority to the Attorney General under Article V, Sect. 3 of the Constitution have included investigation and prosecution in the following categories of actions: various forms of criminality in Frederick County including illegal drug activities and State income tax violations, Winters v. State, 301 Md. 214, 220, 482 A.2d 886, 889 (1984); Medicaid fraud, In Re: Special Investigation No. 244, 296 Md. 80, 87-88, 459 A.2d 1111, 1114-15 (1983); misuse of state services and personnel by the Anne Arundel County Public Defender, Wiener v. State, 290 Md. 425, 428, 430 A.2d 588, 591 (1981); corruption of public officials in connection with the arrest, prosecution, and escape of an

individual from the Baltimore County jail, Green v. State, 25 Md. App. 679, 682, 337 A.2d 729, 731, cert. denied, 275 Md. 749 (1975); Irvin v. State, 23 Md. App. 457, 459, 328 A.2d 329, 331 (1974), aff'd, 276 Md. 168, 344 A.2d 418 (1975); overpayment in state and county funds to school bus contractors in Charles County, Maloney v. State, 17 Md. App. 609, 614-15, 304 A.2d 260, 263-64, cert. denied, 269 Md. 761, 762, 767 (1973).

Mr. Bomhardt's attack on the Governor's direction to the Attorney General as being overly broad fails. The directive was supported by the clear language of the Maryland Constitution and by case law.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT

FOOTNOTES

[1] Attributed to Jim Oigan. See

Republic Ins. Co. v. Bd. of County Comm'rs, 68 Md. App. 428, 429 n.1, 511 A.2d 1136 (1986).

[2] For a background of the relationship between the offices of State's Attorney and Attorney General, see Murphy v. Yates, 276 Md. 475, 348 A.2d 837 (1975); State v. Hunter, 10 Md. App. 300, 305-07 n.5, 270 A.2d 343, 345-46 (1970), modified on other grounds, 263 Md. 17, 278 A.2d 608 (1971).

[3] The Honorable Robert C. Murphy was appointed in 1967 as the first Chief Judge of the Court of Special Appeals. He served in that position until August 11, 1972, when he was appointed Chief Judge of the Court of Appeals, a post he currently holds.

[4] Upon Mr. Bomhardt's demand for a jury trial, the cases were removed to the circuit court and the offenses were tried on the charging documents filed in the district court. Md. rule 4-201(c)(3).

[5] On the first day of trial, Mr. Bomhardt cited the three year statute of limitations for commencement of prosecution for willful failure to file a State income tax return, Md. Ann. Code art 81, sect. 321, and moved to dismiss count one which alleged his willful failure to file a 1981 return. The limitations period for that offense began April 15, 1982. The charging document in the record at that time was a statement of charges issued by a judicial officer on May 2, 1985. The State explained that a criminal information was filed in April

prior to the end of the statutory period. When service was attempted soon thereafter, Mr. Bomhardt refused to accept the summons, and a new statement of charges that led to Mr. Bomhardt's arrest was issued in May.

During the trial, the State introduced a copy of a statement of charges against Mr. Bomhardt which had been issued by a judicial officer of the district court on April 10, 1985. Accompanying that statement of charges were three undated writings entitled "COUNT 1 ... COUNT 2 ... (and) COUNT 3," respectively. The writings elaborated on the charges. Judge Lerner ruled that a criminal information had been "properly filed," and he denied the motion to dismiss count one.

We note the erratic and confusing manner in which the charging documents were processed in this case and suggust that the better practice is to proceed with either an information or a statement of charges as Md. Rule 4-201 provides and to label clearly a criminal information when that document is used. While these suggestions relate to form rather than substance, see Brown v. State, 285 Md. 105, 108-09, 400 A.2d 1133, 1135-36 (1979), consistency and clarity of form in charging documents both simplify and increase the effectiveness of litigation as well as remove unnecessary distraction from substantive issues.

IN THE CIRCUIT COURT FOR

ANNE ARUNDEL COUNTY

CRIMINAL NO. 9216

STATE OF MARYLAND

v.

JOHN EMIL BOMHARDT
Defendant

MEMORANDUM OPINION AND ORDER

The within matter was tried by this Court with a jury on October 9 and 10, 1985. At the conclusion of the case, the Defendant was found guilty of three counts of wilfull failure to file income tax returns for the years 1981, 1982, and 1983. The Defendant subsequently appealed, and pursuant to an unreported Opinion issued by the Court of Special Appeals on September 8, 1986, the conviction of the Defendant was affirmed contingent upon this Court determining

whether the Attorney General possessed the requisite authority pursuant to Article V, Sect. 3 of the Maryland Constitution to investigate and prosecute the Defendant.

Pursuant to the mandate of the Court of Special Appeals, a hearing was held in this Court on October 27, 1986, at which time the Court heard argument on behalf of the State and the Defendant. In addition, the parties stipulated into evidence a letter dated March 9, 1984, from Governor Harry Hughes to Attorney General Stephen H. Sachs in which the Governor authorized and directed "the Attorney General to act with the same power as the State's Attorney for Anne Arundel County in the investigation and prosecution of cases involving criminal violations of the Maryland income tax laws." State's Exhibit 1. In addition,

it was stipulated by counsel for the Defendant that the prosecutor in this case, Daniel R. Anderson, was an Assistant Attorney General at all times pertinent hereto.

Although the Defendant argues that this grant of authority by the Governor to the Attorney General was overbroad in nature and therefore unconstitutional, this conclusion is not supported by the clear language of the Maryland Constitution or by caselaw. Article V, Sect. 3(a) of the Constitution of Maryland clearly permits the Governor to authorize the Attorney General to prosecute any category of cases as directed by the Governor. In particular, this section of the Constitution provides that the Attorney General may:

> (2) Investigate, commence and prosecute or defend any civil or criminal suit or action or <u>category</u>

> f such suits or actions in any of the federal courts or in any court of this state, or before administrative agencies and quasi legislative bodies, on the part of the State or in which the State may be interested, which the General Assembly by law or joint resolution, or the Governor, shall have directed or shall direct to be investigated, commenced and prosecuted or defended.
>
> (3) When required by the General Assembly by law or joint resolution, or by the Governor, aid any State's Attorney or other authorized prosecuting attorney in investigating, commencing, and prosecuting any criminal suit or action or category of such suits or actions brought by the State in any court of this state.

MD. CONSTITUTION, Art. V, Sect. 3(a) (emphasis added). These provisions of the Constitution are bolstered by caselaw which upholds the Governor's right to authorize the Attorney General to investigate and prosecute a category of cases. See In Re Special Investigation No. 244, 296 Md. 80 (1983). This Court rejects the argument made by the De`endant that

the grant of authority contained within the letter of March 9, 1984 from Governor Hughes to Attorney General Sachs is overbroad.

This Court therefore finds that the gubernatorial authorization contained within Governor Hughes' letter of March 9, 1984 to Attorney General Sachs provided to the Attorney General the requisite authority under Article V, Sect. 3 of the Constitution of Maryland to investigate and prosecute the Defendant in this case. As an Assistant Attorney General, Daniel R. Anderson was authorized to act in this case with the same powers as the State's Attorney for Anne Arundel County in the investigation and prosecution of the Defendant.

WHEREFORE, in light of this Court's findings and those of the Court of Special Appeals in its unpublished

Opinion dated September 8, 1986, it is hereby ORDERED that the judgments of convictions originally entered herein on November 26, 1985, hereby stand.

Judge Eugene M. Lerner
Circuit Court for
Anne Arundel County

Filed: October 29, 1986

JOHN EMIL BOMHARDT

v.

STATE OF MARYLAND

In the Court of Appeals

of Maryland

Petition Docket No. 418

September Term, 1986

(No. 1453 September Term, 1985

Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

Robert C. Murphy
Chief Judge

Date: January 2, 1987

MANDATE

Court of Special Appeals

of Maryland

No. 1453, September Term, 1985

John Emil Bomhardt

v.

State of Maryland

September 8, 1986: Per Curiam filed. Case remanded without affirmance or reversal to the Circuit Court for Anne Arundel County for the purpose of conducting a hearing on the authority of the Attorney General to prosecute these charges. The judgments on conviction remain in effect pending further proceedings. Costs to be paid five-sixths by appellant and one sixth by Anne Arundel County.

October 8, 1986: Mandate issued.

STATEMENT OF COSTS:

In Circuit Court: for Anne Arundel County

IND No. 9216

Record.....$40.00

Stenographer's Costs.....$600.00

In Court of Special Appeals:

Filing Record on Appeal...$50.00

Printing Brief for Appellant....
.....$211.20

Reply Brief.....$

Portion of Record Extract -
Appellant.....$

Printing Brief for Cross -
Appellee.....$

Printing Brief of Appellee.....
.....$163.20

Portion of Record Extract -
Appellee.....$

Printing Brief for Cross -
Appellant.....$

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this Eighth day of October A.D. 1986.

Howard E. Friedman

Clerk of the Court of Special

Appeals of Maryland

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1453

September Term, 1985

JOHN EMIL BOMHARDT

v.

STATE OF MARYLAND

Bishop
Bloom
Bell, Rosalyn B.,

JJ.

PER CURIAM

Filed: September 8, 1986

John E. Bomhardt was convicted by a jury in the Circuit Court for Anne Arundel County of three counts of State income tax evasion. The court sentenced him to six month consecutive terms of imprisonment on each count and imposed a fine of $1500. Mr. Bomhardt appeals to this Court raising six questions for our resolution:

> "I. Does a trial judge lack jurisdiction to sentence a defendant to imprisonment for willful failure to file income tax returns when the Information supplying the charge of willfullness (sic), initiated by the Attorney General with undisclosed authority, is not entered until after the defense rests?
>
> "II. Has a defendant in an income tax case been denied an impartial jury where an Internal Revenue agent remains on a jury throughout voir dire?
>
> "III. Is the duty of a married

technician to file Maryland income tax forms, because he recieved wages for labor, stated in Article 81 of the Annotated Code of Maryland with sufficient clairity and certainty to impose criminal sanctions?

"IV. Has the Comptroller for the State of Maryland arbitrarily and capriciously prescribed income tax forms for filing returns that discriminate against the equal opportunity of Maryland residents receiving wages for labor to freely and voluntarily assert the consideration given in the contract for labor?

"V. Does a jury have sufficient evidence to find the elements of willfullness (sic) to support a guilty verdict where the State's exhibits show a defendant considered his conduct to be in conformity with the law?

"VI. Is a trial court's instructions on willfullness (sic) which holds the defendant to a standard of reasonableness erroneous?"

We find merit to only one of appellants challenges and affirm subject to a limited remand.

JURISDICTION

- INFORMATION -

a. Jurisdiction

The record reflects that the Application for Statement of Charges, filed on April 10, 1985, contains the phrase "wilful failure to file taxes." When service of process was first attempted on May 1, 1985, appellant refused to accept the summons and Information; therefore, a warrant was obtained for his arrest. A second statement of charges was filed on May 2, 1985, which omitted the term "wilful", and merely charged him with "failure to file" taxes. Appellant was arrested based on this second statement of charges. Admittedly, a proper Information was filed before the case was completed. After the defense rested, the State filed a statement of charges with the court which did contain the word "wilful."

Appellant asserts the court lacked jurisdiction to sentence him because the Information supplying the charge of "wilful failure to file" income tax returns was not filed until after the defense rested. We hold that the trial judge did have jurisdiction and appellant waived his right to raise this defect.

"(The) primary purpose of a charging document is to fulfill the constitutional requirement contained in Article 21 of the Maryland Declaration of Rights that each person charged with a crime must be informed of the accusation against him." Williams v. State, 302 Md. 787, 790-91 (1985). The court in Williams, supra, established a two-pronged test. First, the charge must characterize the crime. Second, it must describe the alleged criminal act in enough detail to inform the accused of the specific conduct with

which he is charged. Id. at 791.

> "(I)n determining, for jurisdictional purposed, whether an indictment sufficiently charges and characterizes a crime, (it is clear) that merely because the charging document does not allege, expressly or by implication, every essential element of an offense does not necessarily mean that no cognizable crime within the court's subject-matter jurisdiction has been charged (W)hile the customary method of identifying a particular crime charged in an indictment has been to aver its essential elements, that method is not exclusive...."

State v. Chaney, 304 Md. 21, cert. denied, 106 S. Ct. 824 (1985). It is not necessarily fatal if the words of the indictment leave unspecified one or more essential elements of the crime. Jones v. State, 303 Md. 323, 337 (1985), quoting State v. Coblentz, 167 Md. 523, 529 (1934). Furthermore, the particular conduct necessary to establish an offense need not be alleged as elements in the charging document. Jones, supra at 337.

In the case sub judice, appellant

received a copy of the statement of charges which referred to the charge as "failure to file" an income tax return. This phrase adequately fulfills both prongs of the Williams, supra, test in that it characterizes and describes the crime. Appellant knew he was being charged with a criminal violation of Md. Code Ann. Art. 81, Sect. 320 (1957, 1980 Repl. Vol., 1985 Cum. Supp.). He refers to this section of the Code in his pleading entitled "Specific Objection to States (sic) Response to Notice of Special Continuing Appearance." Article 81, Sect. 320, supra, includes only one criminal offense, the willful failure to file tax returns. Therefore, it is reasonable to conclude that appellant was aware he was being charged with this particular crime. Furthermore, he refers to the charge, including the term

"willfully," in his "Demand to Strike Surplusages (sic) from Application for Charging Document," which states:

> "The (a)ccused appears specially and not generally in the above captioned action pursuant to Federal Rules of Criminal Procedure and appropriate Maryland Rules demanding that certain prejudicial allegations be stricken (sic) from the charging document and probable cause application to wit: 2. '... did willfully fail to file....'" (Emphasis added.)

We hold that the purpose of the charging document was served. Appellant demonstrated he was aware of the accusations against him.

b. Waiver of Defect

"(W)here no cognizable crime is charged, the court lacks fundamental subject matter jurisdiction to render a judgment of conviction...." Williams, supra at 792. In the case sub judice, the crime of willful failure to file tax returns was cognizable because the

charging document adequately characterized the crime and informed appellant of the conduct with which he was charged. Id. at 791. Thus, the court had jurisdiction over this matter.

A defect in the charging document other than its failure to show jurisdiction in the court or its failure to charge an offense shall be raised by motion in conformity with this Rule and if not so raised is waived. Rule 4-252(a)(2). "A motion under section (a) of this Rule shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court...." Rule 4-252(b). Appellant's initial appearance before the court occurred on May 6, 1985. In accordance with the Rule, appellant had until June 5, 1985 to raise any nonjurisdictional defects. He waived his

right to challenge the defect in the statement of charges by waiting until the morning of the trial to raise the objection. Chaney, supra. Accordingly, since the statement of charges in the case sub judice was not jurisdictionally defective and was not challenged in a timely fashion, appellant's contention is without merit.

- Prosecutorial Authorization -

Appellant also alleges that, even if the court was correct in applying both charging documents, the prosecutor was not authorized to litigate the case. Appellant contends that "(p)rosecution may be by the Attorney General when authorized by implementation of certain constitutional provisions.... The record does not state that authorization was given for this action (investigation or prosecution)."

The state asserts that appellant has waived this issue for our review. Conceding that before trial appellant sought removal of the Attorney General and appointment of a "public prosecutor," the State suggests that appellant's objection was based on his assertion that the Attorney General manifested a conflict of interest when it swore out the probable cause application in support of the statement of charges. The State argues that at no time did appellant specifically complain that the Attorney General lacked the necessary authorization needed to prosecute this matter.

The authority of the sovereign to govern and exercise control is jurisdictional. 50 C.J.S. Jurisdiction Sect. 320 (Supp. 1985). A question of jurisdiction may be raised at any time.

Cooper v. State, 44 Md. App. 59, 63 (1979). Appellant's objection is a jurisdictional one and hence may now be raised.

Article V, Section 3(a) of the Constitution of Maryland sets out the duties of the Attorney General, including, inter alia:

> "(2) Investigate, commence, and prosecute or defend any civil or criminal suit or action or category of such suits or actions in any of the Federal Courts or in any Court of this State, or before administrative agencies and quasi legislative bodies, on the part of the State or in which the State may be interested, which the General Assembly by law or joint resolution, or the Governor, shall have directed or shall direct to be investigated, commenced and prosecuted or defended.
>
> "(3) When required by the General Assembly by law or joint resolution, or by the Governor, aid any State's Attorney or other authorized prosecuting officer in investigating, commencing, and prosecuting any criminal suit or action or category of such suits or actions brought by the State in any Court of this State."

In State v. Hunter, 10 Md. App. 300, 305-06 n.5, (1970), this Court noted that under Art. V, Sect. 9 of the Constitution of Maryland the power to prosecute at trial level formerly vested in the common law office of Attorney General passed to the State's Attorney. In State v. Aquilla, 18 Md. App. 487, 493-94, cert. denied, 269 Md. 755 (1973), we reaffirmed that responsibility for prosecuting criminal cases at the trial level devolved upon the State's Attorney. Specific authority under Art. V, Sect. 3(a)(3), supra, is necessary for someone other than the State's Attorney to prosecute a criminal case.

In the case, sub judice, the record is barren of any evidence that the Governor or General Assembly conferred on the Attorney General the authorization to investigate and prosecute State income

tax violations, although the State asserts in its brief that such authority exists in a letter dated March 9, 1984 signed by Governor Hughes. Since we are restricted to the record, we order a limited remand under Rule 1071 to the trial court for the sole purpose of ascertaining whether the Attorney General possessed authority to maintain this prosecution. If on remand the court determines that the Attorney General possessed the requisite authority, the judgments of conviction entered are affirmed pursuant to our holdings on the remaining issues. If, however, on remand the court determines that the Attorney General lacked the authority to prosecute, the judgments of conviction are vacated and set aside.

PANEL JUROR

Appellant claims the court erred in

failing to exclude or isolate an Internal Revenue Service agent on the voir dire jury panel because "(t)his (juror) remained a member of the jury panel for an extensive period of time...sat with persons who ultimately constituted the jury of twelve throughout the voir dire...had ample opportunity to affect the impartiality of the jury, and did in fact make comments regarding 'tax protests.'"

The record reflects that juror number 24 was an I.R.S. agent. During voir dire questioning, this juror was struck for cause by appellant. The record reflects that he answered affirmatively the question whether he knew the attorneys in the case and whether he had previously served on a jury panel.[1]

[1]That is the full extent of the record relating to this juror.

The record is barren, however, of even a hint of any prejudicial comments made by this juror. It is equally barren of any objections made by appellant to such alleged comments. Failure of appellant to object contemporaneously to any improper remarks made by a prospective juror or to object prior to his expression that he was satisfied with the jury as empaneled, waives appellant's right to review of this issue. Rule 1085; see White v. State, 300 Md. 719, 729 (1984), cert. denied, 470 U.S. , 105 S. Ct. 1779, rehearing denied, 476 U.S. , 105 S. Ct. 2351 (1985).

In any event, there is no merit to appellant's allegation. Unlike Commonwealth v. Harkins, 328 A.2d 156 (Pa. 1974), cited by appellant, the "prejudicial" remarks of juror 24 in the case sub judice, were not set out on the

record, nor stated obviously in the presence of all prospective jurors. In Harkins, supra, a prospective juror announced aloud that he should not hear the trial because "he (indicating the defendant) stole my car." Id. at 157.

Moreover, appellant does not suggest in what manner he was prejudiced by the remarks or the extent of prejudice. Instead, he merely asserts the remarks were prejudicial. We hold the court did not err in failing to exclude or isolate from the jury panel a tax agent.

MARYLAND TAX LAW

Appellant contends that the Maryland income tax laws violate due process. To this end, he asserts his duty to file a return under Md. Code Ann. Art. 81 Sect. 320 (1957, 1980 Repl. Vol., 1985 Cum. Supp.) was not stated with sufficient clarity and certainty because the law

does not state that wages are equal to income. We disagree.

Section 294 of Art. 81, supra, creates a duty on the part of each Maryland resident to file a tax return form with the comptroller. Md. Code Ann. Art. 81, Sect. 294, supra. The Code also imposes both civil and criminal sanctions for failure to comply with Sect. 294, supra, Md. Code Ann. Art. 81, Sect. 320, supra. The comptroller is directed under Md. Code Ann. Art. 81, Sect. 304(a), supra, to "apply as far as practicable the administration and judicial interpretation of the federal income tax law." Comptroller of the Treasury v. Chesapeake Corp., 54 Md. App. 208, 214, cert. denied, 296 Md. 653 (1983). Section 6012 of 26 U.S.C. (1982) requires a married person to file when his or her gross income exceeds $5400. Gross income is

defined in 26 U.S.C. Sect. 61 (1982) as "the total of incomes." Although a number of items or sources of income are listed, none of these include wages in exchange for labor. It is clear, however, that wages for labor is implied in the phrase "income from whatever source derived," as provided in 26 U.S.C. Section 61, supra. We hold that appellant's duty to file was stated with sufficient specificity.

MARYLAND TAX FORMS

Appellant argues that the "comptroller ...has arbitrarily and capriciously prescribed income tax forms...(which) discriminate against the equal opportunity of Maryland residents receiving wages for labor to freely and voluntarily assert the consideration given in the contract for labor." He further contends that "the structure of the federal...and

Maryland...forms for individual income tax returns discourages, and inhibits, the voluntary entry of the information necessary to sever income from wages for labor."

The Maryland income tax law clearly states a duty to file a tax return form. Md. Code Ann. Art. 81, Sect. 294, supra. These forms do provide a "space" or "line" for income. They may, however, be added to in any manner. Appellant could easily have attached his request for an exemption to the form when he returned it, rather than ignore his duty to file. Further, if appellant claims he is exempt from filing because his wages equaled his labor, he must prove that such an exemption exists. State Tax Commissioner v. Baltimore Block and Tile Co., 180 Md. 620, 627 (1942). Appellant failed to demonstrate that this exemption was

authorized by law. Thus, appellant's contention is without merit.

SUFFICIENCY OF THE EVIDENCE

The State presented evidence to demonstrate that appellant's failure to file tax returns for 1981-1983 was willful. Appellant contends the evidence shows a lack of willfulness on his part, and claims a defense of subjective mistake of law. Where two opposing inferences may be drawn from the same evidence, the jury is at liberty to believe whichever inference it chooses. Pinkney v. State, 12 Md. App. 598, 604, cert. denied, 263 Md. 781 (1971).

The following evidence was presented by the State. Appellant did file an income tax return in 1978 but not thereafter. In 1982, however, he submitted a withholding form to his employer stating that he "did not owe any

Maryland income tax." Appellant sent a letter to his employer requesting the return of a signed affidavit "in order to eliminate the possibility of an accusation of having filed a fraudulent withholding form." After receiving a letter from the office of the comptroller which informed appellant that he was not exempt from withholding tax, and which reported that his employer had been instructed to begin withholding taxes from his wages, appellant threatened to institute legal action against his employer. Appellant refused to file the tax forms for years 1979 and 1983 that were sent to him by a revenue specialist with the office of the comptroller. Interestingly, appellant demanded cash from the tenants of his rental property and preserved no record or receipt of this income.

"(W)illfulness may be established through proof that the accused's failure to file constituted a voluntary intentional violation of a known legal duty, not the result of accident or mistake or other innocent cause." Johnson v. State, 294 Md. 515, 518-19 (1982). The reasonable inference could be drawn from the filing of a 1978 tax return form that appellant knew of the duty to file income tax returns yearly. His actions and correspondence with his employer demonstrate he understood the requirement of filing. Further, it was not unreasonable to infer that appellant demanded cash from his tenants to avoid declaring the rental income on his return. It was reasonable to conclude, therefore, that he did not have a "mistaken understanding of the law," as he claims.

Appellant points to State's Exhibit 4B and 5 to suggest the State established and proved a subjective mistake of law on his part. State's Exhibit 4B was an affidavit prepared and signed by appellant in which he stated that he was neither liable for any income tax nor required to submit an employee withholding exemption certificate. Exhibit 5 was a letter sent by appellant to his employer, which stated that the I.R.S. tax regulations did not apply in his case. Also submitted as part of Exhibit 5 was an MW-4 certificate with the word "incorrect" written in capital letters across its face.

Appellant confuses the possible existence of a defense with evidence sufficient to disprove willfulness. As stated, the jury was free to draw reasonable inferences from the evidence

presented, Pinkney, supra, and the evidence was sufficient to prove the element of willfulness beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original); Tichnell v. State, 287 Md. 695, 717 (1980).

JURY INSTRUCTIONS

Appellant argues that the trial court's instructions on willfulness were erroneous because they failed to inform the jury of the subjective mistake of law defense, and insufficient because they incorrectly explained willfulness. Appellant has failed to preserve these issues for our review. Rule 4-325(e). He did not object to the jury instruction on willfulness, either in discussion at the bench before the instruction was given, or immediately after it was read to the jury. On both occasions,

appellant had the opportunity to object and did not do so. He did, however, object to other instructions at both times.

In any event, we find no error in the instructions. The Court of Appeals has held that "attention should not be focused on a particular portion (of the challenged instructions) lifted out of context, but rather its adequacy is determined by viewing it as a whole." Poole v. State, 295 Md. 167, 186 (1983), quoting State v. Foster, 263 Md. 388, 397 (1971), cert. denied, 406 U.S. 908 (1972).

In the case sub judice, the instruction given by the court was as follows:

> "As I instructed you an element of the crime with which the (d)efendant is charged is wilfulness. As used in the criminal law <u>wilfully characterizes an act which is done knowingly and with</u>

deliberate intention for which there is no reasonable excuse. The element of deliberate intention requires that there be a full and conscious design to violate the law. You are instructed that the (d)efendant's conduct is not wilful if he acted through negligence, inadvertence, justifiable excuse or mistake, or due to his good faith misunderstanding of the requirement of the law. However, mere disagreement with the law in and of itself, does not constitute good faith misunderstanding of the requirements of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Stated otherwise, while a good faith misunderstanding of the law may negate wilfulness, a good faith disagreement with the law does not. Furthermore, any misunderstanding must be in good faith." (Emphasis added).

Appellant contends that the use of the phrase "no reasonable excuse" to explain willfulness negated the defense of subjective mistake of law. While the trial judge did use this language in the instruction, the language was explained. The court provided examples of situations where the defendant's conduct would not be deemed willful, and followed this with

contrasting examples where willfulness would be present. He defined "good faith misunderstanding," and distinguished it from mere disagreement with the law. Finally the judge emphasized that any misunderstanding must be in good faith.

Thus, in light of the trial judge's clarifications and explanations, when the instruction is read in toto, it is correct. Therefore, appellant's contentions that the instruction was erroneous and insufficient to prove willfulness are without merit.

CASE REMANDED WITHOUT AFFIRMANCE OR REVERSAL TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR THE PURPOSE OF CONDUCTING A HEARING ON THE AUTHORITY OF THE ATTORNEY GENERAL TO PROSECUTE THESE CHARGES.

THE JUDGMENTS ON CONVICTION REMAIN IN

EFFECT PENDING FURTHER PROCEEDINGS.

COSTS TO BE PAID FIVE-SIXTHS BY APPELLANT AND ONE SIXTH BY ANNE ARUNDEL COUNTY.

CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

COMMITMENT RECORD

State of Maryland v. John Emil Bomhardt

Criminal Case No. 9216 DOB: 01/27/29

Docket: Folio:

Term: September 1985

Trial by Court

Judge: Hon. Eugene M. Lerner

Date of Verdict: 10/10/85

Date Sentence Imposed: 11/22/85

Court charge:

1. Failure to file income tax return

   Plea: Not Guilty Verdict: Guilty

2. Failure to file income tax return

   Plea: Not Guilty Verdict: Guilty

3. Failure to file income tax return

Plea: Not Guilty Verdict: Guilty

Prisoner is committed to the jurisdiction of the Superintendent of the Anne Arundel County Detention Center commencing on 11/22/85 for a period of:

Count	Years	Months	Days
1		6	Concurrent
2		6	Consecutive
3		6	Consecutive

WT #2 CONS TO WT #1 & WT #3 CONS TO WTS. #1&2

Truly taken from the docket proceedings of the Circuit Court for Anne Arundel County, in testimony whereof, I hereunto set my name and affix the Seal of the said Court this 22nd day of November, 1985.

E. Aubrey Collison, Clerk
Circuit Court for Anne Arundel County